

The Honorable John H. Chun

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

AMAZON.COM, INC., *et al.*

Defendants.

No. 2:23-cv-0932-JHC

**DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTION FOR
LEAVE TO FILE RESPONSE TO
NOTICE OF SUPPLEMENTAL
AUTHORITY**

NOTED ON MOTION CALENDAR:
March 22, 2024

Defendants respectfully submit this response to the FTC's motion for leave to file a supplemental brief in response to Defendants' Notice of Supplemental Authority regarding *Daly, et al. v. Amazon.com, Inc., et al.*, No. 22-cv-00910 (W.D. Wash.). *See* Dkt. 151. Defendants take no position on the FTC's request for leave, however if this Court grants that request, Defendants respectfully ask that the Court likewise grant Defendants leave to file the Reply attached as Exhibit A.

DATED March 6, 2024.

I certify that this memorandum contains 75 words, in compliance with the Local Civil Rules.

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EXHIBIT A

The Honorable John H. Chun

UNITED STATES DISTRICT COURT
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FEDERAL TRADE COMMISSION,

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AMAZON.COM, INC., *et al.*

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No. 2:23-cv-0932-JHC

**DEFENDANTS' REPLY IN
SUPPORT OF NOTICE OF
SUPPLEMENTAL AUTHORITY**

The FTC's response to Defendants' Notice of Supplemental Authority regarding *Daly, et al. v. Amazon.com, Inc., et al.*, No. 22-cv-00910 (W.D. Wash.), does not accurately describe the import and applicability of *Daly* to this action.

Although the FTC attempts to distinguish *Daly* by arguing that the Prime enrollment process challenged in that case is "different" from the enrollment processes in this case (Dkt. 151, Ex. 1 at 2), they are essentially the same. Indeed, the *Daly* plaintiffs and the FTC challenge the enrollment process for the same Amazon subscription service (Prime) and complain about the same design elements. *Compare, e.g., Daly* Dkt. 14 ¶¶ 74-77 (characterizing the material terms in the enrollment processes as "smaller" than surrounding text and beneath the final checkout button), *with* Dkt. 67 ¶¶ 43, 50, 61, 231 (stating same).

Comparing the Prime flows at issue in each case, while there are minor differences in the presentation of Prime's benefits, the location, presentation, and substance of the "material terms" considered by Judge Martinez (and to be considered by this Court) are virtually identical. *Compare* Dkt. 67 ¶ 107 (identifying price and auto-renewal disclosures as material terms), *with*

Dkt. 149, Ex. A [*Daly Order*] at 11 (stating same). For example, the enrollment flows challenged in both *Daly* and here: (a) disclose Prime's price and autorenewal terms in nearly the same language, positioned near the same location on the offer page, using the same bolded typeface; and (b) present enrollment and decline links in nearly the same language, placed near the same location, using the same colors. These similarities are evident simply by comparing screenshots from the *Daly* complaint and the FTC's complaint.

Daly Dkt. 14 [*Daly Amended Complaint*] ¶ 69 (arrows added for emphasis):

Amazon Prime Checkout Page – Free Trial Subscription

We're giving you Prime benefits FREE for 30 days
After your FREE trial, Prime is just \$12.99/month

Free delivery Free and convenient ways to get millions of items.	Award-Winning Movies & TV Shows Watch what you love with award-winning Amazon Originals, popular movies, TV shows, and live events.	Over two million songs, ad-free Millions of ad-free songs and custom playlists from Amazon Music. Listen hands-free with Alexa or on-the-go when you download to your mobile device.	Books, Magazines & More Unlimited reading on any device
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Are you a student?
Have an EBT card/receive government assistance?

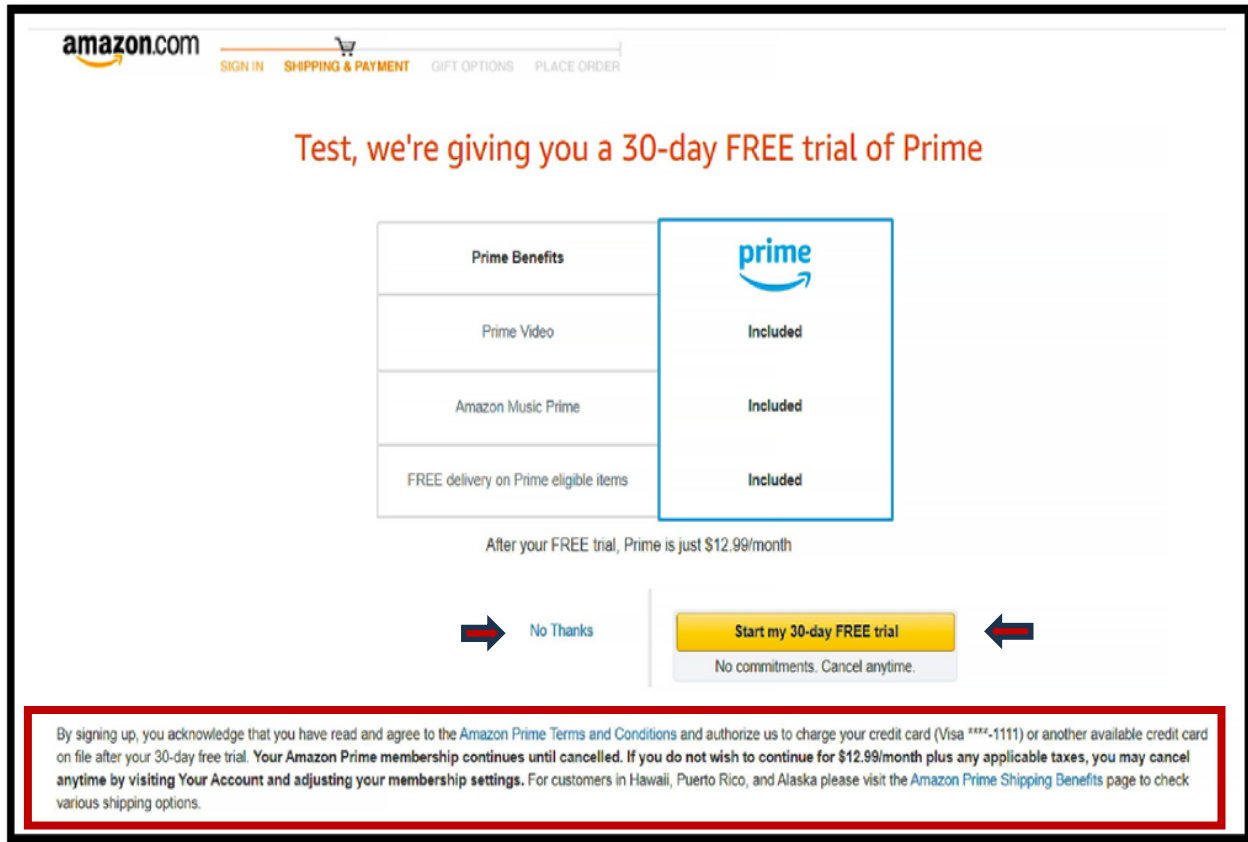
Payment method
[Redacted] change
Amazon gift card balance
Your gift card balance, when available, will be used to pay for your Prime membership.

Billing address
[Redacted] change

➡ No Thanks
Start your 30 day free trial ⬅

By signing up, you agree to the Amazon Prime Terms and authorize us to charge your default payment method or another payment method on file after your 30 day free trial. **Your Amazon Prime membership continues until cancelled. If you do not wish to continue for \$12.99/month + any taxes, you may cancel any time by visiting Your Account.** For customers in Hawaii, Puerto Rico, and Alaska please visit the Amazon Prime Shipping Benefits page to check various shipping options.

Dkt. 67 [FTC Amended Complaint] at Ex. D (arrows and red box added for consistency):



The FTC also suggests that the Court should disregard *Daly* because the plaintiffs did not allege that they were “attempting to purchase products on Amazon and instead end[ed] up enrolled in Prime.” Dkt. 151, Ex. 1 at 2. But one of the *Daly* plaintiffs did allege that when “purchas[ing] her Kindle Device,” she was “unwittingly enrolled” into an auto-renewing subscription. *Daly* Dkt. 14 ¶¶ 12, 145, 149. Nevertheless, Judge Martinez found all the challenged processes in *Daly* satisfied the Automatic Renewal Laws’ (ARLs’) disclosure and consent requirements as a matter of law.¹ See Dkt. 149, Ex. A at 11-14. The FTC’s attempted deflection of *Daly* also does not explain why nearly identical language, using the same font, in a parallel or similar placement can be “clear and conspicuous” as a matter of law in some situations but not in others.

¹ Judge Martinez reached that conclusion based on a facial review of the enrollment processes, regardless of the context in which they were presented, and despite the *Daly* plaintiffs’ allegations (similar to the FTC’s) about the purported implications of internal Amazon documents. *Daly* Dkt. 14 ¶¶ 33, 94.

1 Finally, the FTC notes that Judge Martinez declined to dismiss the *Daly* plaintiffs’
 2 challenge to Amazon’s subscription-cancellation practices. Dkt. 151, Ex. 1 at 1. But the FTC
 3 omits that the California and Oregon ARLs at issue in *Daly* impose cancellation-related
 4 requirements that go above and beyond ROSCA’s requirements. For example, the California
 5 ARL requires that consumers be permitted to terminate their subscription “exclusively online, at
 6 will, and without engaging any further steps that obstruct or delay immediate cancellation.” Dkt.
 7 149, Ex. A at 15. ROSCA, by contrast, requires only “*simple mechanisms* for a consumer to stop
 8 recurring charges” 15 U.S.C. § 8403(3) (emphasis added). As explained in Defendants’
 9 Motions to Dismiss, Amazon provides multiple simple cancellation methods. Dkt. 85 at 16-20.

10
 11 DATED March 6, 2024.

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